



ST Mugacha t/a Galaxy Auctioneers v Global Trucks Limited (Miscellaneous Civil Application E365 of 2020) [2024] KEHC 9577 (KLR) (Civ) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E365 OF 2020**

CW MEOLI, J

JULY 31, 2024

BETWEEN

ST MUGACHA T/A GALAXY AUCTIONEERS RESPONDENT

AND

GLOBAL TRUCKS LIMITED APPLICANT

RULING

1. For determination is the motion dated 11.12.2023 by Global Trucks Limited (hereafter the Applicant) seeking *inter alia* that the Court be pleased to vacate and set aside its ruling delivered on 07.11.2023 and all consequential orders; that the Court be pleased to review its ruling delivered on 07.11.2023; that the Court be pleased to refer the bill of costs by S.T Mugacha t/a Galaxy Auctioneers (hereafter the Respondent) dated 14.12.2020 for fresh taxation before Taxing Master and with suitable directions; and that in the alternative to review, the Court be pleased to exercise its discretion and tax the bill of costs dated 14.12.2020 itself.
2. The motion is expressed to be brought pursuant to Section 1A, 3, 3A and 80 of the [Civil Procedure Act](#) (CPA), Order 10 Rule 11 & Order 22 Rule 22 of the [Civil Procedure Rules \(CPR\)](#) on grounds on the face of the motion as amplified in the affidavit of Moses Mavoko, described as a Director of the Applicant.
3. The gist of his deposition is that Applicant did not participate in the hearing of the application dated 09.05.2023 not having been served with any pleadings and notices for mention or hearing, and that the Applicant being unrepresented was condemned unheard. That motion dated 09.05.2023 was served upon the Applicant's erstwhile counsel after the souring of the relationship, and hence the Applicant never received the motion. He states that the Applicant only came to learn that the impugned ruling has been delivered when Auctioneers presented warrants of attachment after the bill of costs dated 14.09.2020 was taxed and a certificate of costs it is yet to receive issued; that the Applicant is a stranger



to the said bill of costs dated 14.09.2020 as it was never served therewith ; that the taxed costs in respect of the said bill was manifestly excessive and is so high as to confine access to justice to the wealthy; and that the taxing officer improperly exercised her discretion as the correct value of the subject matter was indeterminate from the pleadings. He asserted that the Respondent cannot benefit from any commissions before realizing any proceeds from sale. In conclusion he deposes that the Court has wide discretion to allow the motion and that the Respondent will suffer no prejudice.

4. The Respondent opposed the motion is by way of a replying affidavit deposed by Joseph Makumi, counsel having conduct of the matter on behalf of the Respondent. He assails the affidavit in support of the motion by stating that the motion dated 09.05.2023 was duly served upon the Applicant and the same allowed in the presence of the current Applicant's counsel, being unopposed. He goes on to depose that the bill of costs was physically and personally served upon the Applicant, and thereafter determined and the resultant reference thereto heard and determined by the Court by way of dismissal.
5. Therefore, the Applicant cannot state that it was unaware of the bill of costs heard by the Deputy Registrar and Judge who dismissed their reference. That the Respondent's bill of costs was drawn to scale and appropriately taxed with reasons for the taxation thereof duly issued by the taxing officer. He views the motion as a second attempt at challenging the decision of the taxing officer, in clear contravention of Rule 55(5) of the Auctioneer Rules which requires the Applicant to challenge the decision of the taxing officer within seven (7) days of its delivery.
6. He states that the Applicant's counsel on record was duly notified of the entry of judgment of the taxed costs and that it would be prejudicial to the Respondent if the Court were to set aside its judgment of 07.11.2023 more so because the Applicant has actively participated in the taxation proceedings and further unsuccessfully challenged its outcome thereof. In summation he deposed that the present motion is an attempt at denying the Respondent the fruits of successful litigation and ought to be dismissed with costs.
7. In a rejoinder by way of a supplementary affidavit, Moses Mavoko takes issue with various items in the Respondent's taxed bill of costs dated 14.09.2020 and the resultant taxing officer's decision, hence urging the Court to allow the motion.
8. Directions were issued on disposal of the motion by way of oral submissions. On the part of the Applicant, counsel maintained that the Applicant's grievance against the taxing officer's decision is premised on the grounds that the warrants did not emanate from the Court and that there was a duplication of instructions in the said bill of costs. It was further submitted that the Respondent did not recover any money so as to be entitled to a commission.
9. On the part of the Respondent, counsel argued that the application dated 09.05.2023 was duly served and a ruling delivered on the same. It was further submitted that the Applicant actively participated in the taxation proceedings and the subsequent reference dismissed by the Court. He asserted that the motion appears to be a further reference on matter already determined by the Court and time barred in any event. Counsel maintained that the Applicant was duly served with the motion dated 09.05.2023 through its previous counsel and the issue of mistake of counsel as advanced by the Applicant cannot be re-canvassed herein in light of Majanja, J's ruling on the Applicant's reference. That the interim order since granted by the Court ought to be discharged, pointing out that the instant cause and or bill of costs are four (4) years old. Hence a further reference cannot be agitated through present motion.
10. In a brief rejoinder, counsel for the Applicant asserted that the stay of execution granted by Mulwa, J. granted the Applicant orders of *status quo*.



11. The Court has taken the liberty of perusing the entirety of the Court record and considered the material canvassed in respect of the motion. The background events have in part been captured by the parties in their respective affidavit material outlined above. That said, the Applicant in his motion has sought a raft of orders all essentially grounded on the prayer seeking the setting aside and or review of this Court’s decision delivered on 07.11.2023. The Court proposes to deal with prayers contemporaneously. The Applicants’ motion invokes *inter alia* the provisions of Section 1A, 1B, 3A & 80 of the [CPA](#) as well as Order 10 Rule 11 of the [CPR](#). The latter provision provides that

“Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

The specific Order referred to therein relates to

“Consequence of non-appearance, default of defence and failure to serve”.

Plainly, the forestated provision has no application in this matter in light of the pertinent events.

12. The Applicant equally seeks review of this Court’s ruling delivered on 07.11.2023 which appears to be premised on the provisions of Section 80 of the [CPA](#) which provides that

“Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

13. Evidently, the motion stems from a ruling of this Court issued on 07.11.2023 that allowed the Respondent’s motion dated 09.05.2023, on grounds that the same was unopposed. The ruling in question will be addressed and reproduced later herein. That said, it is not clear why counsel for the Applicant while drafting the motion, would present alongside the prayer for review, a prayer equally seeking

“...to vacate and set asidethe ruling.....delivered on the 07.11.2023...”

Knowing all too well the purport of the specific words in the context of the pertinent facts herein.

14. This being the case, the Court will first address the prayer relating to review before dealing with the prayer seeking to vacate and set aside this Court’s order. In [Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited](#) [2020] eKLR the Court of Appeal observed that an application for review involves exercise of judicial discretion. Here, there are legion authorities on the principles governing a motion brought under Section 80 of the [CPA](#) as read with Order 45 of the [CPR](#) which stipulates specific grounds upon which review may be sought. Reading through the Applicant’s supporting and further affidavits it is apparent that both barely disclose any of the specific grounds under Order 45 upon which the review prayer is predicated, despite the Applicant’s invocation of Section 80 [CPA](#) herein. Thus, it is difficult to see the relevance of Section 80 and by extension the justification for the prayer seeking review in the proceedings.



15. Nevertheless, alongside other provisions the Applicant also invoked Section 3A of the [CPA](#) which to my mind may have some bearing on the matter before the court. Section 3A of the [CPA](#) specifically reserves

“the inherent power of the Court “to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court”.

16. In relation thereto, the Court of Appeal in [Rose Njoki King’au & Another v Shaba Trustees Limited & Another](#) [2018] eKLR observed that: -

“Also cited was Section 3A of the [Civil Procedure Act](#) which enshrines the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. In [Equity Bank Ltd versus West Link Mbo Limited](#) [2013], eKLR, Musinga, JA stated *inter alia*, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the [Constitution](#) or statute. Such power enables the judiciary to deliver on their constitutional mandate....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

The Supreme Court went further in [Board of Governors, Moi High School Kabarak and another versus Malcolm Bell](#) [2013] eKLR, to add the following:-

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.”

17. Here, it is undisputed that on 07.11.2023 the Court allowed the Respondent’s motion dated 09.05.2023 that sought judgment to be entered in its favour against the Applicant for a sum of Kshs. 898,859.50/- plus interest at 12% per annum from 14.10.2020 until payment in full. It would be important to observe that the motion was premised on a ruling of the taxing officer rendered on 15.12.2022 taxing the Respondent’s bill of costs dated 14.09.2020. A perfunctory dissection of the reliefs, provisions and grounds relied on by the Applicant suggests that the Court’s jurisdiction is invoked pursuant to Section 3A of the [CPA](#). The Applicant essentially seeking to vacate and/or set aside the court’s order allowing the Respondent’s motion 09.05.2023 rather than a review of the said order.

18. It is settled that the discretion of the Court to set aside its order is unfettered and that a successful applicant is obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court’s discretion in their favor. In the case of [Shah -vs- Mbogo and Another](#) [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

“The discretion to set aside an *ex-part* judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not



designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

19. The principles enunciated in *Shah –vs- Mbogo (supra)* were amplified further by Platt JA in *Bouchard International (Services) Ltd vs. M’Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside *ex parte* judgments, the principles pronounced therein apply with equal force in this matter, considering that the orders issued by this Court on 07.11.2023 conclusively determined the instant miscellaneous taxation cause and or proceedings by entering judgment in the sum of the taxed costs.

20. With the foregoing in reserve, the relevant and brief history this matter is as follows. The Respondent filed an Auctioneers Bill of Cost dated 14.09.2020 that was subsequently taxed *ex parte* 25.02.2021. This prompted the Applicant to file a Chamber Summons application dated 18.10.2021 seeking among other orders

“that leave be granted to the Applicant to file an appeal out of time against the ruling of the Taxing Master dated 19.08.2021; an order to set aside the entire decision of the taxing master and certificate of costs issued on the 19.08.2021; and in the alternative this Court does remit the entire bill of costs to another taxing master.”

By the ruling delivered on 31.03.2022, the court struck out the Applicant’s Chamber Summons with costs.

21. Once more, the Applicant moved the Court by another motion dated 27.07.2022 seeking *inter alia*

“that an order be issued setting aside the *ex parte* taxation proceedings on the bill of costs dated 14.09.2020, the taxation ruling dated 25.02.2021, the certificate of taxation dated 19.08.2021 and any other order emanating from the *ex parte* proceedings”.

22. Pursuant to orders made on 29.07.2022, the motion was placed before the Deputy Registrar for determination. Upon hearing, the Deputy Registrar allowed the motion by setting aside the *ex parte* taxation proceedings and consequential orders and directed that the Respondent’s bill of costs be heard afresh, which was done. On 15.12.2022 the taxing officer rendered her ruling in respect of the Respondent’s bill of Costs dated 14.09.2020 wherein she taxed the bill at Kshs. 898,859.50/-. It is against the backdrop of this taxation ruling that the Respondent moved the Court by the motion dated 09.05.2023 “seeking that judgment be entered in terms of the taxed costs of Kshs. 898, 859.50/-”. The said motion was allowed during the proceedings of 07.11.2023, thus prompting the present motion seeking to set aside the said ruling.

23. After a prior adjournment of the motion by the Respondents seeking entry of judgment on taxed costs, the court on 7.11.2023 heard the respective arguments of counsel present and delivered an *ex tempore* ruling as follows; -

“Application for adjournment on behalf of the Respondent is by a party who is not properly on record. The matter was adjourned on 02.10.2023 because erstwhile counsel for the Plaintiff indicated intention to cease acting. It is not clear why the Respondent waited until this morning to instruct a new advocate to represent him and while aware of the proceedings scheduled today. The application is not properly made or merited and is rejected.



The application dated 09/05/2023 stands unopposed as no response has been filed thereto, and no counsel has been properly instructed in the matter to act for the Respondent who is equally absent. The motion is allowed with costs.” (sic)

24. As earlier observed, setting aside an order of the Court involves exercise of discretion of which is “intended to avoid injustice or hardship resulting from accident, inadvertency or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice”.

Here the Applicant’s explanation in respect of the proceedings of 07.11.2023 is *inter alia* that it was never served with any pleadings and notices for mention or hearing of the application dated 09.05.2023, that the Applicant was unrepresented in matter having parted with its erstwhile counsel and was condemned unheard. The Respondent dismissed the Applicant’s explanation by summarily contending that motion dated 09.05.2023 was duly served upon the Applicant and the same allowed in the presence of the current Applicant’s counsel as it was unopposed.

25. For starter’s the Applicant’s affidavit is deficient of any material demonstrating the alleged souring of the relationship between it and erstwhile counsel. From the record, when the Respondent’s motion dated 09.05.2023 first came up on 02.10.2023, the Applicant’s purported erstwhile counsel appearing in the matter, Mr. Irungu, was directed to file a motion to cease acting by close of business on 06.10.2023. The Court further directed that the Respondent’s motion dated 09.05.2023 and motion to cease acting be served on the Applicant personally before it scheduled both motions for hearing on 07.11.2023.
26. A review of the Case Tracking System (CTS) reveals that the present counsel for the Applicant only came on record on 15.11.2023 despite the Court’s earlier directions. Where is the proof of alleged accident, inadvertency or excusable mistake or error on the part of the Applicant leading to injustice? Evidently, from the record and the Respondent’s affidavit material (see Annexure J.M 2(a) & J.M 2(b)), the Applicant’s erstwhile counsel Messrs. KMK Law LLP was duly served with the Respondent’s motion dated 09.05.2023 and hearing notice thereof for 02.10.2023. On the latter date, the erstwhile counsel was directed to file and serve its application to cease acting which it appears, he failed to do.
27. The Court is not inclined to accept the explanation offered by the Applicant concerning service and or purported mistake of erstwhile counsel herein. Parties and counsel alike are duty bound to co-operate with the Court in the furtherance of the overriding objective to facilitate the just, expeditious, proportionate, and affordable resolution of disputes in accordance with Section 1A and 1B of the [CPA](#). It is manifest here and as highlighted in this Court’s ruling on 07.11.2023, that the Applicant has approached this matter in a shambolic fashion, and it is disingenuous of it to attempt to piously lay the blame on erstwhile counsel while not admitting its own responsibility.
28. Cases belong to litigants and not counsel. The Applicant was responsible to instruct counsel appropriately and promptly in order to progress the case. Despite service of the motion seeking judgment no response had been filed by the Applicant. Taxation proceedings are designed for expediency, yet this cause has been pending for 4 years, primarily due to a series of missteps by the Applicant and his advocates. Overall, the Applicant’s conduct appears to demonstrate an intention to obstruct or delay the conclusion of the matter, and indifference to its duty to assist the court in furthering the overriding objective, by *inter alia* complying with court orders and directions.



29. The Court of Appeal in *Daqare Transporters Limited v Chevron Kenya Limited* [2020] eKLR while considering the discretion of the Court under the provisions of Order 12 Rule 7 of the *Civil Procedure Rules* restated the principles spelt out by its predecessor in *Shah v Mbogo (supra)*, namely, that:

“The discretion under Order 12 Rule 7 is exercised so as to avoid injustice as a result of inadvertent or excusable mistakes and errors. Therefore, a court needs to satisfy itself as to whether the reason given by the appellant was excusable.....

.....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. “

See also the Court of Appeal case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others*, [2015] concerning the corresponding duty of counsel to the court and other parties.

30. Consequently, the Court is not persuaded that it ought to set aside its orders of 07.11.2023. Litigation must come to an end.

31. The foregoing should dispose of the entire motion, but for completeness, the court will consider the prayer seeking to refer Respondent’s bill of costs dated 14.12.2020 for fresh taxation before taxing master and or that this Court be pleased to exercise its discretion and to tax the bill of costs dated 14.12.2020. Firstly, the bill of costs in question is an Auctioneers Bill of Costs. The Respondent has correctly asserted that a challenge in respect of the bill at this juncture contravenes Rule 55(5) of the *Auctioneers Rules*, which requires that a challenge to the decision of the taxing officer be lodged within seven (7) days of the taxation ruling. Here, the impugned decision of the taxing officer was delivered on 15.12.2022. The present motion was filed close to a year later, and evidently, prompted by the judgment entered on 7. 11. 2023.

32. Rule 55 of the *Auctioneers Rules* states as follows: -

“(1) Except as may be provided by any other written law or by contract the fees set out in the Fourth Schedule payable to the auctioneer for the attachment, repossession and sale of movable and immovable property under court warrants or letters of instructions shall be charged in accordance with these Rules.

(2) Where a dispute arises as to the amount of fees payable to an auctioneer—

(a) in proceedings before the High Court; or (b) where the value of the property attached or repossessed would bring any proceedings in connection with it within the monetary jurisdiction of the High Court, a Registrar, as defined in the *Civil Procedure Rules* (Cap. 21, Sub. Leg.), may on the application of any party to the dispute assess the fee payable.

(3) In any other case where a dispute arises as to the amount of fees payable to an auctioneer a magistrate or the Board may, on the application of any party to the dispute, assess the fees payable.



- (4) An appeal from a decision of a registrar or a magistrate or the Board under sub rules (2) and (3) shall be to a judge in chambers.
- (5) The memorandum of appeal, by way of chamber summons setting out the grounds of the appeal, shall be filed within 7 days of the decision of the registrar or magistrate.”

33. Rule 55 (5) of the *Auctioneer Rules* is couched in mandatory terms. And it would appear that the Applicant’s present challenge of the taxing officer’s decision is manifestly caught up by limitation of time, while no leave has been sought to appeal out of time. Further, upon reviewing the CTS system and annexures marked J.M 5(a) & J.M 5(b), it appears that the Applicant had made an earlier attempt vide Misc. Civil Application No. E835 of 2022 to challenge the taxing officer’s decision, which was dismissed by Majanja, J. for non-attendance on 06.11.2023. Rather than move the Court appropriately in Misc. Civil Application No. E835 of 2022, regarding the dismissal order, the Applicant opted to file the instant motion seeking prayers essentially like those in the dismissed motion in Misc. Civil Application No. E835 of 2022.

34. This conduct recalls the dicta of the Court of Appeal in *Energy Regulatory Commission v John Sigura Otido* [2021] eKLR. The Court in determining what constitutes abuse of the process of the court, observed that; -

“We start with the issue of alleged abuse of the court process. What is the meaning of “abuse of the court process” That term has been the subject of consideration in a number of decisions by this Court and other Courts. In *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* (*supra*) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of *Sarak v Kotoye* [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows:-

“The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice...”

The same Court went on to cite examples of abuse of judicial process which include: -

- “(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different courts even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.”

35. The Applicant’s prayer seeking re-taxing of the Auctioneer’s bill of costs is an afterthought, bereft of merit and must equally fail. The Applicant is clearly guilty of abusing the process of the court, through dilatory conduct, involving the filing of a multiplicity of applications and causes without diligent follow through, thereby needlessly dissipating the court’s time. Such a party cannot hope to benefit from the discretion of the court. The motion dated 11.12.2023 is without merit and is accordingly dismissed with costs to the Respondent.



DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For Respondent: Mr. Makumi

C/A: Erick

